This case is remitted to the board with a direction that it erred in law in refusing, on the grounds stated by it, the certificate sought by the owner, and that if, on further consideration, the board is of the opinion that it is in the public interest that the owner be permitted to demolish the premises for the purpose of rebuilding, the board should consider such representations as may be made by the tenants with a view to imposing such conditions as to it may seem just, to alleviate any hardship between the parties.

Order accordingly.

Solicitors: *Bannon & Bailey.*

SURAIN SINGH v. YATIM EUSOPE

[A.C.J. (Wee Chong Jin J.) February 28, 1962]

[Singapore — District Court Appeal No. 4 of 1962]

Money and Moneylending — Dismissal of plaintiff's claim as being contrary to s.5 of the Moneylenders Ordirance (Cap. 193) — Finding of fact by District Judge against weight of evidence — Whether respondent could rely on s.5 — Moneylenders Ordinance, 1959.

Interpretation and General Clauses Ordinance (Cap. 2), s.14(c) — "Accrued" of "acquired" right.

The plaintiff claimed $774 being the balance of principal and interest due on a promissory note. The defendant's main defence was that he did not borrow any money from the plaintiff but from someone else — a nephew of the plaintiff. In the court below the learned District Judge accepted this defence and dismissed the plaintiff's claim on the ground that it was in breach of section 5 of the old Moneylenders Ordinance (Cap. 193). The plaintiff appealed. It was contended for the appellant in this appeal that the District Judge's finding of fact was wrong as being against the weight of evidence. It was further contended that the old Moneylenders Ordinance (Cap. 193) having been repealed by the Moneylenders Ordinance, 1959, the respondent could not rely on section 5 of the repealed Ordinance.

Held: having regard to the evidence adduced at the trial and to the grounds of decision of the District Judge the finding of fact by the District Judge was wrong as being against the weight of evidence because it was difficult to accept the respondent's oral testimony unsupported by other evidence that he did not borrow the money from the plaintiff.

Per Curiam: "Looking at the Moneylenders Ordinance, 1959, as a whole it is plain that the intention of the legislature was not to deprive a person who had borrowed money from a moneylender from being able, in the case where the moneylender had ceased to carry on business after the coming into force of this Ordinance, of the right in a suitable case to avail himself of a defence based on section 5 of the old Ordinance. This being so, I apprehend that the necessary action will no doubt be taken quickly by the legislature to remedy what may be a defect in the present Ordinance."

DISTRICT COURT APPEAL.

P. Coomaraswamy for the appellant.

Respondent in person.

Cur. Adv. Vult.

Wee Chong Jin J.: In this appeal the plaintiff is appealing against the judgment of the learned District Judge dismissing his claim for $774 being the balance of principal and interest due on a promissory note.

No defence was filed and at the trial the defendant, who was English speaking, was unrepresented and conducted his own defence. It appeared from his cross-examination of the plaintiff and from his oral testimony that his main defence was that he did not borrow any money from the plaintiff but from someone else by the name of Arjan Singh, a nephew of the plaintiff. The trial judge accepted this defence and dismissed the plaintiff's claim on the ground that he was "in breach of section 5 of the old Moneylenders Ordinance (Cap. 193)".

The plaintiff was admittedly a moneylender when the old Moneylenders Ordinance (Cap. 193) was in force and at the time when the alleged loan was made by him to the defendant but had ceased to be a moneylender after the coming into operation of the Moneylenders Ordinance, 1959.

Assuming that the trial judge's finding of fact that the defendant did not borrow any money from the plaintiff and that the loan was made to him not by the plaintiff but by the plaintiff's nephew, Arjan Singh is justified on the evidence, this appeal must necessarily fail on the ground that the contract was not between the plaintiff and the defendant but between Arjan Singh and the defendant and it would be immaterial whether or not the provisions of the old Moneylenders Ordinance (Cap. 193) had been complied with by the plaintiff.

Counsel for the plaintiff, however, contends that the learned judge's finding of fact was wrong as being against the weight of the evidence. Having regard to the evidence adduced at the trial and to the grounds of decision of the learned judge, I agree with this contention.

The evidence of the defendant, which he gave in English, disclosed that the person from whom he alleged he obtained the loan, was known to him since the year 1956 and that this person was working as a driver at No. 3 Sub-Depot, B.O.D. where the defendant was a storekeeper. His evidence was that he took two loans of $300 each from this person and that the promissory note sued on was one of the two notes he signed in respect of these two loans. He further stated that he did not know this person's full name but merely knew him as Singh until after he was served with the summons in this case.

With respect to the trial judge, I find it hard to believe that the defendant on these facts did not know the full name of his fellow employee until after he was served with the summons. Having come to the conclusion as I do that the defendant knew Arjan Singh's full name while they were fellow employees, I find it difficult to accept the defendant's oral testimony unsupported by other evidence that he did not borrow the money from the plaintiff but from Arjan Singh, in view of the fact that the promissory note, which the defendant acknowledged he had signed as the borrower, contained the name of the plaintiff and not of Arjan Singh as the lender and the acknowledgment portion

similarly contained the name of the plaintiff as the lender.

As the trial judge based his decision merely on his finding that the plaintiff was not the lender, with which finding I do not agree, the appeal must be allowed.

It is also contended by counsel for the plaintiff that the old Moneylenders Ordinance (Cap. 193) having been repealed by the Moneylenders Ordinance, 1959, the defendant could not rely on section 5 of the repealed Ordinance. Counsel relied on the common law principle that the effect of a repeal of an Act of Parliament is that the Act repealed is treated as *ab initio* non-existent and that accordingly, unless the defendant had any rights which by virtue of the provisions of section 14(c) of the Interpretation and General Clauses Ordinance (Cap. 2) were unaffected by the repeal of the old Ordinance, the plaintiff was entitled to judgment on his claim notwithstanding that he had not complied with the provisions of section 5 of the old Ordinance. The argument put forward was that section 5 of the old Ordinance merely rendered unenforceable any money lending contract unless the requirements of that section had been complied with by the lender. That section therefore merely gave the borrower a right to defend any claim by his lender for repayment of money lent to him and was not an "accrued" or "acquired" right within the meaning of section 14(c) of the Interpretation and General Clauses Ordinance. It is counsel's contention that the right given to a defendant by that section did not become an accrued right until an action had been commenced against him by his lender. This being so, it is contended that, there being no saving clause in the Moneylenders Ordinance, 1959, preserving this mere right, the effect of the total repeal of the old Ordinance was that that right vanished together with the old Ordinance and was no longer available to a borrower.

As my view on the main issue of fact, namely, that the plaintiff was in fact the lender, is decisive of this appeal, I do not think it desirable for me to express any final view in regard to this contention especially as the defendant was not represented at the appeal. It would seem, however, without coming to a final conclusion on this point, that on principle and on the authority of the cases cited to me, this contention is well-founded. It may, however, be unnecessary for this state of uncertainty to remain. Looking at the Moneylenders Ordinance, 1959, as a whole it is plain that the intention of the legislature was not to deprive a person who had borrowed money from a moneylender from being able, in the case where the moneylender had ceased to carry on business after the coming into force of this Ordinance, of the right in a suitable case to avail himself of a defence based on section 5 of the old Ordinance. This being so, I apprehend that the necessary action will no doubt be taken quickly by the legislature to remedy what may be a defect in the present Ordinance.

The appeal is accordingly allowed and judgment will be entered for the plaintiff for $774 and costs on the District Court scale. Counsel for the plaintiff has intimated that in the event of this appeal succeeding he would not ask for the costs of the appeal. There will be therefore no order as to the costs of this appeal.

Appeal allowed.

Solicitors: *Braddell Bros.*

LEONG CHEONG KWENG MINES LTD. v. KOK HOONG

[C.A. (Thomson C.J., Hill and Good JJ.A.) March 6, 1962]

[K.L. — F.M. Civil Appeal No. 33 of 1961]

Estoppel — Agreement to hire machinery — Successful judgment on a claim to arrears of rent due — No defence to claim filed by defendant — Second action for arrears of rent due covering a subsequent period — Defences raised under the Moneylenders Ordinance, 1951 and Bills of Sale Enactment (Cap. 57) — Whether defendant estopped from averring facts on which they wish to found their defences — Distinction between res judicata and estoppel "by matter of record" — Nature of estoppel "by matter of record."

Evidence Ordinance, 1950, s.115 — Distinction between "estoppel" and "res judicata".

The Court of Appeal reversing the decision of Ong J. in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*, p. 35, *supra*, held:

Held: the question to be decided which was in its essence one of estoppel and not one of *res judicata* was whether the defendants not having set up the defences under the Moneylenders Ordinance and the Bills of Sale Enactment in the first action were estopped in the second action from averring the facts in which they wished to found these defences. When a plaintiff in an action makes averments relevant to his action which are not denied, the defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel however arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law. The defendants are not estopped from averring that the plaintiff is a moneylender or any of the other facts on which they seek to base their defences under the Moneylenders Ordinance or the Bills of Sale Enactment.

Cases referred to:—

(1) *In re A Bankruptcy Notice* [1924] 2 Ch. 76, 97.
(2) *Griffiths* v. *Davies* [1943] 2 All E.R. 209, 212.
(3) *Munni Bibi* v. *Tirloki Nath* 58 I.A. 158, 165.
(4) *Sarat Chunder Dey* v. *Gopal Chunder Laha* 19 I.A. 203, 215.
(5) *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] A.C. 287, 304.
(6) *Duchess of Kingston's case* 2 Smith's L.C. (13 Edn.) 644, 657.
(7) *Ord* v. *Ord* [1923] 2 K.B. 432.
(8) *Robinson* v. *Robinson* [1943] P. 43, 44.
(9) *Howlett* v. *Tarte* 10 C.B. (N.S.) 813.
(10) *Humphries* v. *Humphries* [1910] 2 K.B. 531.
(11) *Leaf* v. *Tuton* 10 M. & W. 393.
(12) *Cooke* v. *Rickman* [1911] 2 K.B. 1125.
(13) *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155.